1985

Stephen Norris Alexander v. Diane Jean Alexander : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

STATE OF UTAH

STEPHEN NORRIS ALEXANDER,

Plaintiff and Appellant,

vs.

DIANE JEAN ALEXANDER,

Defendant and Respondent.

: Supreme Court No. 20841

APPELLANT'S BRIEF

Appeal from the Judgment of the
Second Judicial District Court
In and For Davis County, State of Utah,
The Honorable Douglas L. Cornaby, Presiding

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IN THE SUPREME COURT

STATE OF UTAH

STEPHEN NORRIS ALEXANDER,		
Plaintiff and Appellant,	:	APPELLANT'S BRIEF
vs.	:	
	:	Supreme Court No. 20841
DIANE JEAN ALEXANDER,	:	
Defendant and Respondent.		

STATEMENT OF ISSUES

1. The court erred in deciding custody of the youngest child, Jamie, in that the trial court failed to give the highest priority to the best interest of that child.

2. The trial court erred in deciding custody of the youngest child, Jamie, in that the trial court's decision was contrary to the overwhelming weight of evidence.

3. The trial court erred in deciding custody of the youngest child, Jamie, in that the trial court inappropriately applied, or failed to apply, the terms and provisions of Section 30-2-10 Utah Code Annotated, where the trial court determined that the defendant had abandoned the plaintiff, but declined to grant plaintiff custody of all the minor children.

4. The trial court erred in failing to allow for tax obligations and contributions subsequent to the desertion to be deducted from the

value of plaintiff's profit-sharing like account, and further failed to offset the marital liabilities in determining the value of the marital estate and its division.

DETERMINATIVE STATUTES

Section 30-2-10 Utah Code Annotated (1953, as amended): Homestead rights -- Custody of children. Neither the husband nor wife can remove the other or their children from the homestead with the consent of the other, unless the owner of the property shall in good faith provide another homestead suitable to the condition in life of the family; and if a husband or wife abandons his or her spouse, that spouse is entitled to the custody of the minor children, unless a court of competent jurisdiction shall otherwise direct.

STATEMENT OF THE CASE

Nature Of The Case

Plaintiff appeals from the judgment, order and decree in the District Court awarding defendant custody of the youngest child, Jamie Alexander, where plaintiff was awarded custody of the other three minor children issue of the marriage; plaintiff further appeals from the decision of the District Court respecting issues of property division and child support.

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Disposition In The Lower Court

The matter was tried to the court whereupon the trial court granted plaintiff a divorce from defendant on the grounds of cruel treatment by the defendant directed to not only the plaintiff but to the children as well, and upon the further ground that defendant had had an adulterous affair. The trial court then divided custody of the children between the parties, the youngest, Jamie Alexander, going to the defendant, and made a division of the property and assets of the marriage on the apparent basis of equal shares, with exceptions that plaintiff is here seeking relief from. The trial court awarded no alimony or child support for either party.

Statement Of Facts

This action involves proceedings for a divorce and other relief pertinent to such actions sought in the lower court by plaintiff after the plaintiff, three of the four minor children and the parties' home was abandoned by the defendant on or about the 18th day of July, 1984, attendant the defendant's adulterous affair with James Dvorak. The parties hereto had been married on the 2nd day of May, 1968 in Tucson, Arizona. During the course of the marriage the parties had born issue to them four children: Darla Rene Alexander, born October 5, 1968; Beverly Alexander, born February 20, 1970; Stephen Norris Alexander, Jr., born October 19, 1971; and Jamie Alexander, born November 14, 1980.

During the course of the marriage the defendant treated plaintiff and the parties' children cruelly (Transcript, page 133; hereinafter referred to as T. 133), indulged in extra-marital affairs (T. 11), was abusive toward the children and irresponsible. Sometime before the month of July 1984 the defendant developed a relationship with James Dvorak, which led to events such as the attendance of the defendant, with the children present, at a drive-in movie, during which the defendant sat closely to and in an apparent romantic posture towards James Dvorak. This relationship developed further to the point that on or about July 18th, 1984, the defendant deserted or abandoned the family home, three of the minor children and the plaintiff (T. 136; T. 95), to travel in conjunction with James Dvorak, who was at that time was also married (T. 76). During the course of defendant's travels with Mr. Dvorak the defendant and the parties' youngest child, Jamie, shared the same bed with Mr. Dvorak (T. 72); during trial on this matter the defendant denied sharing the same bed as described by Mr. Dvorak in his testimony (T. 95), but the court unequivocally was persuaded as to the accuracy of Mr. Dvorak's testimony versus that by the defendant (T. 135).

Prior to the defendant's desertion in July of 1984 there had developed a crisis in the family attendant the oldest daughter's second suicide attempt, that attempt involving a self-inflicted gunshot wound to the head and consequent brain damage, and having taken place in March of 1984. In direct response to that tragic circumstance the entire family became involved in therapy; while that

therapy was primarily focused on the problems and needs of the oldest daughter, both plaintiff and defendant were extensively involved in numerous sessions with Dr. David Earl Nilsson, a neuropsychologist (with extensive training and experience in areas relative to child psychology, as set forth in plaintiff's exhibit number 6 admitted into evidence, including having been Chief of Psychology at Primary Children' Medical Center, 1980-1982), and his associates (T. 44 - 55).

During the course of therapy the defendant was informed of the nature of her oldest daughter's injuries and particularly that individuals with injuries such as the daughter's are characteristically "emotionally volatile, impulsive, have a difficult time being able to manage stress, are much more anxious, often depressed." (T. 46) Notwithstanding her knowledge of these factors the defendant engaged in a course of conduct aggravating the stress, anxiety and insecurity of the oldest daughter by the aforementioned conduct at the drive-in and, more importantly, more dramatically, by deserting that daughter precisely when her needs were the greatest. That conduct was "extremely detrimental" to the welfare and health of that child. (T. 51)

Overall, and the record amply bears this out, not only in the private conversations the court carried on with each of the three older children (T. 114-124), the testimony of the plaintiff (T. 11-13), the testimony of Dr. Nilsson (T. 44 - 55), and the uncontroverted course of conduct in abandonment by defendant, the defendant engaged in a pattern of behavior evidencing instability and

irresponsibilty that resulted in the abuse and mistreatment of all three of the older children. In addition thereto, the plaintiff's testimony gave at least one instance of abuse directed to the youngest child, Jamie (T. 12).

The parties had acquired various assets during the course of the marriage, including an interest in real property, the parties' home, located at 361 East 300 South, Bountiful, Utah. The parties' had also acquired various motor vehicles, items of personal property, household furnishings and bank and retirement accounts. The trial court determined that the assets of the marriage had a total value of Seventy-three thousand Six Hundred Twenty-Nine Dollars ($73,629.00), which should be divided equally (Findings - Paragraph 13; hereinafter F. 13). These assets included the following: Thirteen Thousand Seven Hundred Ninety Dollars ($13,790.00) in savings derived from withdrawl from one of the plaintiff's profit-sharing like accounts and determined as of July 1984; Twenty Four Thousand Three Hundred Seventeen Dollars ($24,317.00) remaining in profit-sharing like retirement accounts with no deduction for amounts contributed after July, 1984 and no deduction for income tax obligations thereon; Twenty-Four Thousand Dollars ($24,000.00) in home equity; and Eleven Thousand Five Hundred Dollars ($11,500.00) in other personal property including household furnishings. The court ordered an equal division of these assets and that plaintiff pay the outstanding obligations of the marriage without credit or an offset therefore respecting division of the assets. Excluding auto and home mortgage obligations there

remained more than Seven Thousand Dollars ($7,000.00) in outstanding marital obligations.

During the pendency of the divorce the defendant returned unannounced to Utah, in March 1985, removed the older children from school and entered the parties' home to remove various items therefrom. The older children refused to leave at that time with defendant. The youngest child continued to reside with defendant, although there was an unserved Order To Show Cause and Temporary Order giving plaintiff custody temporarily. (Record - pages 16-17; hereinafter R. 16-17)

The matter was heard by the Honorable Douglas L. Cornaby on the 22nd day of April, 1985, and immediately upon the conclusion of closing arguments the court made its ruling. After some dispute and discussion pertaining to the court's findings, as between counsel for the parties, plaintiff submitted findings consistent with the transcript of the court's ruling, and judgment was accordingly entered pursuant thereto on the 17th day of July, 1985.

SUMMARY OF ARGUMENT

In rendering a determination on the issue of custody the trial court erred and abused its discretion, first, in inappropriately giving weight to a preference for the mother; secondly, in inappropriately dividing the children; and, thirdly, in reaching a decision not based on the best interest of the youngest child. The court's decision, in this regard, was blatantly inconsistent with its

own findings and in conflict with the overwhelming weight of the evidence; the trial court's decision constituted an action so flagrantly unjust as to be an abuse of discretion and should be reversed.

The trial court further failed to appropriately consider and apply the provisions of Section 30-2-10 Utah Code Annotated; where the evidence and findings showed that there was an abandonment of the homestead the trial court should have invoked a presumption that custody was properly to be awarded to the non-deserting parent, the plaintiff.

In rendering a decision regarding the division of marital assets the trial court ruled inconsistently, failing to give due credit, or an offset for, uncontroverted tax consequences and marital debts in excess of those for auto loan and home mortgage obligations; in doing so the trial court abused its discretion and the decree should be modified or remanded accordingly.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO GIVE THE HIGHEST PRIORTY TO THE BEST INTERESTS OF THE CHILD IN MAKING ITS CUSTODY DETERMINATION.

A. The Trial Court Was Improperly Influenced By A Preference For The Mother.

There are, perhaps, few if any decision-making problems imposed on trial judges that are more difficult than decisions affecting the custody of children, particularly young children of so-called "tender-years." The trend of recent decades, combining an unfortunate number of family dissolutions with increased emphasis on the equal standing of members of both sexes, has frequently thrust this difficult dilemma into the courts, trying the patience and wisdom of even the most conscientious and fair-minded judges. The history of this Court is hardly devoid of custody disputes; on the contrary, the numerous cases that have reached this Court, on this issue, have resulted in an extensive legacy of case law outlining in quite specific detail the guidelines, rules of law and relative lack of presumptions that are to guide the trial judge in addressing and deciding custody disputes. The prevailing and unequivocal standard, as between natural parents, is that custody should be determined by placing the highest priority on the children's welfare and best interests. See Mechan v. Mechan, 544 P. 2d 479 (Utah 1975): Bingham v. Bingham, 575 P.2d 703 (Utah 1978); Jesperson v. Jesperson, 610 P.2d

326 (Utah 1982); Nilson v. Nilson, 652 P. 2d 1323 (Utah 1982).

Like a relatively calm sea where a tortuous undertow swirls beneath the otherwise innocuous appearing surface, the apparent simplicity of the "best interest" rule conceals the often turbulent complexity of issues, concerns, problems of proof and, finally, difficulties attendant appellate review, that complicate if not undermine the process of applying this "equitable in the highest degree" (Mechan, supra) determination. It has been long and often noted:

> No hard and fast rule with respect to what may be considered the best interests of a child can ... be laid down to govern in all cases. Each case must be determined upon its own peculiar facts and circumstances. Jones v. Moore, 213 P. 191, at 194 (Utah 1923); cited in Tuckey v. Tuckey, 649 P. 2d 88, at 90n (Utah 1982).

The practical result, despite the purportedly unequivocal semantics and intent of the "best interest" rule (which has been refined and bolstered by a broad framework of case law regarding specific factors; see Hutchinson v. Hutchinson, 649 P. 2d 38, at 41 (Utah 1982) where most such factors, with citations, are enumerated), has been the continued entrenchment of a practical preference strongly favoring the mother, which is a preference rarely articulated by trial courts but frequently articulated by trial experienced counsel, speaking frankly, in consultations with clients inquiring of the feasibility of the father seeking custody (it works both ways: mothers are assured and fathers are discouraged, regardless of the child's best interests, unless there are easily proven and relatively extreme

circumstances). As a consequence even the father who goes to court in good faith, seeking custody because he sincerely believes that is in the child's best interest, confronts, as a matter of practice, the hurdle of a burden of persuasion tipped against him.

The significance of this underlying preference surfaced in the case presently before the court, but not obviously so until the trial court was pressed for more specific findings regarding the court's decision on custody. (T. 139-140). The trial court stated, at T. 141, "Now, I haven't found the defendant to be an unfit mother ..." Again, at T. 142, the trial court further stated:

> I recognize that instability in the defendant's life. I'm not saying that it's such an instability that it creates her from being a fit parent to care for that one child, and of all the children to award to her, that's obviously to the Court the best division the Court can make.

Setting aside for later argument the error of the trial court here in applying a "dividing" the children approach to determining custody, the above language, particularly when combined with other references to the "fitness" of the parties by the trial court (see addendum of transcript of the court's ruling), clearly illustrates the degree and extent to which the trial court had practically imposed the burden of persuasion on the plaintiff, the father, to convince the court not merely that he is the better custodian but that the mother could not adequately provide for the child, that the mother was virtually unfit for custody.

This very real de facto preference for the mother is often ignored or reasoned around, its influence manifested though it is not

articulated. Those seeking appellate review of decisions believed to be so influenced are usually left to resorting to the argument that given the circumstances and the nature of evidence and testimony, it is to be logically inferred that a preference for the mother must have influenced the court even though that consideration was not articulated. Such arguments are hardly persuasive in the absence of substantial and direct support from the record. See Nilson v. Nilson, 652 P. 2d 1323 (Utah 1982). The unfortunate consequence, however, as is plainly evident in the trial court's ruling in this case, that preference for the mother continues to bear strong influence, rendering decisions inconsistent with the equal protection guarantees of the federal and state constitutions, decisions inconsistent with statutory and case law, and decisions inconsistent with the best interests of our children. Only when informed legal counsel can confidently advise, and divorcing parents can know, that the courts will in fact award custody pursuant to the children's best interest, only then will the legal system be assured that it is best facilitating the appropriate decision-making process among that vast majority of divorcing parents who decide between themselves (theoretically subject to judicial review) the custody arrangements of their children. The effects of the preference, unchecked upon judicial review, range far beyond the relatively few custody decisions rendered by judges after litigation.

It is here submitted that the continued entrenchment of this, uusually non-articulated preference, is assured by the strict

application of the current standard of review in custody matters:

> Only where the trial court action is so flagrantly unjust at to constitute an abuse of discretion should the appellate forum interpose its own judgment. Jorgensen v. Jorgensen, 599 P. 2d 510, at 512 (Utah 1979).

That standard of review is clearly appropriate in cases where the trial court clearly applied the appropriate guidelines and rules in exercising its discretion on the issue of custody. Absent a record that clearly indicates the application of the proper guidelines and rules by the trial court, however, the reviewing court should invoke a standard of review that more closely scrutinizes the basis for the trial court's decision. Where it appears upon such review that the trial court materially or substantially deviated from the standard of "in the best interests of the child" rule, then the reviewing court, this Court, should invoke its own decision based on the record (it is equity review) or remand, depending on the particular facts of record in individual cases. It is, on the other hand, patently unjust to children and parents to allow custody determinations not clearly based on the child's best interest to stand absent a showing of "action so flagrantly unjust as to constitute an abuse of discretion."

The other side of this argument is compellingly simple: making a custody determination not based on giving the highest priority to the child's best interests is, on its face, an abuse of discretion, even if the facts of the particular case do not render that action "flagrantly unjust." The underlying concept here has been noted previously by this Court in finding an abuse of discretion:

> Failure to consider pertinent facts makes it impossible for the trial court to exercise a fully informed discretion. Kallas v. Kallas, 614 P. 2d 641, at 646 (Utah 1980).

In the case here pending the language of the trial court's ruling and findings is replete with references to "fitness," and other terms referring to the parties' abilities to adequately care for the child. Nowhere does the trial court even invoke or speak of the "best interest" of the child standard. Pressed for specific findings the trial court states:

> There's been nothing before the Court to show there's any lack of care for that child. There's been nothing to show she has not properly cared for that child during the period of time of approximately, not quite, near nine months, whatever it's been since she left with that child.
>
> There's some instability, and for that purpose, she's, you know, she's lost the custody of three children. (emphasis added) (T. 140)

Even a cursory review of the trial court's ruling exposes the nature of the burden the father, the plaintiff, had in this case; the practical burden of persuasion imposed on the plaintiff was to convincingly show that the mother deserved to lose custody. In this regard the trial court's comment as to why she "lost" custody of the older three is not on point: the evidence overwhelmingly showed that defendant deserted those children, abandoned custody, and that defendant unilaterally removed the youngest from her home, from her siblings and from her father (the transcript is replete with evidence of this conduct, and defendant admits to it at T. 95). Perhaps, upon an objective review, maybe the defendant did deserve to lose custody of her children, including the youngest; counsel for plaintiff did not

present such a case to the trial court or argue such a point to the trial court (T. 125-128), and does not argue it here; that issue is and was inappropriate. The trial court erred in this regard and abused its discretion.

B. The Trial Court Inappropriately Divided The Children.

Several aspects of the argument set forth above apply with like force here. Again, the language of the court's ruling indicates that the court was inappropriately influenced by factors other than the best interest of the youngest child in deciding that custody of that child should go to the mother, the defendant. The trial court stated: "...of all the children to award to her, that's obviously to the Court the best division the Court can make." (emphasis added; T. 142) While it may be unfair to characterize a trial court's basis for a decision upon the quote of a single statement, in the case here before this Court counsel specifically requested specific findings as to the court's reasons in making the custody decision (T. 139-140) and in responding to that request the trial court does not even mention the testimony of Dr. Nilsson (see T. 54-55, where Dr. Nilsson unequivocally recommends that the plaintiff is the better custodian for all four children), seems to overlook the testimony by James Dvorak about Jamie sharing the same bed as he and the defendant for a period of weeks (T. 72), finds that the defendant is not an unfit person to have custody of Jamie and therefore awards the defendant custody, as the "best division" the court could make.

Although the trial court enjoys broad discretion in custody matters, that discretion is not so broad that the trial court can apply such standards as it chooses. Again, as in the above argument, it is here submitted that the trial court failed to apply the appropriate guidelines in deciding custody and therefore, as a matter of law, the court abused its discretion, and its decision should be replaced by that of this Court.

C. The Evidence Overwhelmingly Preponderates In Favor Of A Finding That The Plaintiff Is The Proper Person To Be Awarded Custody Of The Youngest Child, Jamie.

Where, as in this case, the trial court has abused its discretion by considering inappropriate factors, as set forth in A. and B. above, this Court should review the record and render a decision based upon a preponderance of the evidence. The record and evidence in this case is more fully argued below, in Point III, and that argument is incorporated herein as if fully set forth. It is here respectfully submitted that the record clearly demonstrates that the plaintiff, and not defendant, should be awarded custody of the youngest child, Jamie Alexander.

POINT II

THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN AWARDING DEFENDANT CUSTODY OF JAMIE WHERE THE COURT FOUND THAT THE DEFENDANT ABANDONED THE PLAINTIFF, THE PARTIES' HOME AND THE OTHER CHILDREN.

Section 30-2-10 Utah Code Annotated (1953, as amended) provides, in pertinent part:

> ...if a husband or wife abandons his or her spouse, that spouse is entitled to the custody of the minor children, unless a court of competent jurisdiction shall otherwise direct. (emphasis added)

In the case here pending the court stated in its ruling, "The Court does look at the trip, that you left as basically abandoning the family ..." (T. 136). That finding is consistent with the uncontroverted testimony of the plaintiff, Dr. Nilsson, and James Dvorak, and with the admissions of the defendant (T. 95; Pl. Exhibits 7 and 8). Notwithstanding that finding the court granted defendant custody of the youngest child, reasoning that "She took that child with her. She didn't abandon that child." (T. 140)

First, the provisions cited, supra, are specifically invoked where one abandons the "spouse," and is not dependent on a finding of abandonment of the children involved. There is an obvious rationality behind this: abandonment of the children would be an act so flagrantly detrimental to the welfare and best interest of those children that, as a matter of law (and absent compelling circumstances to the contrary), the non-deserting spouse would be the better custodian; no specific statute need address that situation.

Secondly, the provisions cited, supra, constitute a statutory

recognition of the importance of a stable and continuing family unit, and the integral significance of the family home, the "homestead," to that unit. It is a recognition that this is so important of a factor in providing a healthy and wholesome environment for the raising of children, that the spouse that abandons the homestead has, per se, acted in a manner so detrimental to the welfare and interest of the children (again, absent compelling circumstances to the contrary), that the non-deserting spouse, the spouse remaining with the homestead, is the better custodian.

Thirdly, said provisions, when applied, should serve to discourage precisely the irresponsible pattern of conduct that occurred in this case, to discourage spouses from deserting the home and such children they choose to abandon, taking with them only the children they choose and hope to retain custody of with little regard for the welfare of the other children or the family unit.

It is respectfully submitted that in the absence of compelling circumstances and specific findings in that regard, that the provisions cited, supra, create a strong presumption in favor of the non-deserting spouse respecting custody of all the minor children; that in the case here before the Court, the trial court's failure to apply these provisions appropriately constituted a flagrant abuse of discretion and should be reversed.

POINT III

THE WEIGHT OF EVIDENCE OVERWHELMINGLY PREPONDERATED IN FAVOR OF AWARDING PLAINTIFF CUSTODY OF JAMIE AND IT WAS A FLAGRANT ABUSE OF DISCRETION TO ORDER OTHERWISE.

A. The Findings Of The Trial Court Are Inconsistent With A Finding That It Was In The Best Interest Of Jamie To Be Awarded To The Custody Of Defendant.

Among the statements of the trial court in ruling on the case before it, are the following:

> That defendant has treated the plaintiff cruelly, causing him to suffer great mental distress by leaving the home of the parties ... having an affair with another man, and for cruel treatment to the children. (emphasis added, T. 133)
>
> There's no question, that all three of the older children have had some bad experiences that they're claiming from you, Mrs. Alexander. Not discipline, but beatings, and as I award that younger child to you, it's with concern that there may be a reptition of those things. (emphasis added, T. 133)
>
> The Court believes, Mrs. Alexander, that there's been a great deal of instability. (emphasis added, T. 134-135)
>
> The Court does look at the trip, that you left as basically abandoning the family, not just a marital problem. (emphasis added, T. 136)
>
> There's some instability, and for that purpose, she's, you know, she's lost custody of three children. (T. 140)
>
> And though I find -- I'm saying there's some instability. I recognize that instability in the defendant's life ... of all the children to award to her, that's obviously to the Court the best division the Court can make. (T. 142)
>
> Those three older children do not want to live with

> the defendant, even though all three of them expressed love for her. (T. 142)

In contrast to the above, in responding to testimony by the defendant and by the man in whose apartment she resided at the time (see T. 87-88), Roger Carrender, as to the condition they purportedly found the parties' home in upon making an unannounced visit in March of 1985, the trial court stated:

> I'm aware, too, that I can't ignore that testimony, Mr. Alexander, that try like you would, you may not be maintaining the kind of cleanliness of a home that needs to be for raising the three children you've got. I recognize it's only your wife and her friend that have testified to those things.
>
> ...if the home was as bad as it's been testified to on that day your wife went in on March 1985, then I'm assuming that was not a normal condition. (emphasis added, T. 134)

Clearly the court considered that testimony suspect, otherwise the court wouldn't have said "if the home was as bad," and the court would not have assumed that that was not the normal condition. Furthermore, the trial court had ample opportunity to inquire of all three older children privately in chambers and chose not to inquire further into this area.

Finally, the Court is directed to the trial court's findings, paragraphs 3,5,7 and 8. It is respectfully submitted that the award of custody of Jamie to the defendant is so inconsistent with the court's other findings as to constitute "flagrant injustice" and an "abuse of discretion" that should be reversed.

B. The Evidence Of Record Overwhelmingly Preponderates In Favor

Of Custody Being Awarded To Plaintiff.

The evidence and testimony presented to the trial court demonstatively established the following:

1. That the defendant was suffering from instability, evidenced not only by her conduct in abondoning the family and plaintiff, but also in the testimony of Dr. Nilsson. (T. 55)

2. That the defendant had acted to the detriment of all three of the older children through cruel treatment (F. 3), beatings (T. 133; T. 114-123) and deserting those children in July 1984.

3. That the defendant had acted immorally in the presence of all four children, engaging in a romantic involvement outside the marriage at the drive-in (T. 71-72; T. 50-51), and particularly in Jamie's presence by sharing a bed with Mr. Dvorak during their travels. (T. 134-135; T. 72-73)

4. That the romantic and immoral entanglements the defendant involved herself in had direct and detrimental effects on the welfare of all four children: three were abandoned, the fourth and youngest was torn away from her siblings, her home and her father (evidence of this is repeated throughout the transcript and record).

5. That the defendant had, in particular, knowingly and recklessly endangered the health and welfare of the oldest daughter whose injuries had left her particularly vulnerable (T. 46, 50-52, 99), by that pattern of conduct outlined above; and that such blatant disregard for the welfare of her oldest child further evidenced the degree of instability, impulsivity and poor judgment being exercised

by the defendant.

6. That plaintiff is employed, earning a good wage with good benefits (T. 18-28; R. 28-32), whereas the defendant made no showing of any income (R. 35), and therefore the plaintiff was clearly in a much better posture to provide, economically, for the needs of all the children.

7. That the only expert testimony presented was that of Dr. Nilsson, who unequivocally recommended that the plaintiff be awarded custody of all four children. (T. 55).

8. That Dr. Nilsson had extensive contact with all members of the family, including some 15-20 hour-long sessions involving the presence and participation of the defendant (T. 59-61, 98-99), and he is a well-qualified expert to render an opinion regarding custody matters (Pl. Exhibit 6, T. 44-45, 55-57).

9. That the plaintiff, Mr. Alexander, assumed the duties of a single parent of three at home, and affirmatively continued the family's as well as the oldest daughter's involvement in therapy (T. 53-54), thereby endeavoring to continue a stable and relatively secure environment for the remaining family.

10. That the behavior pattern of the defendant is one that is particularly detrimental to the welfare of the youngest child; Dr. Nilsson testified:

> From her impulsivity, her poor judgment, and events of the last nine months, I feel that that type of behavior, that type of impulsivity and poor judgment creates a great deal of stress on children, especially a very young child. It's important they have that stabilty and consistency that appears to have been absent. (T. 55).

The evidence presented at trial, most of it uncontroverted, most of it convincingly credible as evidenced by the other findings and statements of the court, overwhelmingly preponderated in favor of awarding plaintiff custody of all four children. Not only would such an order have kept the siblings together, it would have kept them together in the home and neighborhood they had resided in for many years. In contrast the trial court rushed to make a decision, pushing counsel as to time (T. 67-69), and rather than pausing to allow plaintiff an opportunity to present rebuttal to defendant's closing argument the trial court immediately stated its ruling, rather than take the matter under advisement even if for only such period of time to consider the exhibits admitted into evidence. The latter included two letters written by defendant (Exhibits 7 and 8) that were direct and demonstrative evidence of defendant's immature judgments, instability, admissions against interest and statements conflicting with defendant's own testimony before the court.

It is here respectfully submitted that the trial court acted capriciously, abused its discretion and rendered a decision that constituted a flagrant injustice, not only to plaintiff but to the youngest child, Jamie, as well. That decsion should be reversed and the plaintiff awarded custody.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO TAKE ACCOUNT OF OFFSETS IN DIVIDING THE MARITAL ESTATE.

At issue here are the following: the tax obligation and post-July 1984 contributions relative to the profit-sharing like stock ownership plans that plaintiff could withdraw from only upon retirement or termination, and those marital debts over and above auto loan and home mortgage obligations which plaintiff was ordered to pay. In reference to the latter, first, plaintiff does not contend that the order that he pay those obligations was an abuse of discretion, only that where such obligations amount to more than Seven Thousand Dollars ($7,000.00), as they do here (R. 29) and the court determines that the assets of the marital estate should be divided equally, then it is an abuse of discretion to not deduct or offset such amount from the value of the estate: clearly the estate's real value is, as a practical and economic fact, diminished by its debts. (The obvious example of the propriety of this is the universally accepted approach to considering the contribution of real property holdings to the value of the estate: only the equity is considered.)

Regarding the profit-sharing plans, the plaintiff's uncontroverted testimony clearly conveyed the nature of these plans and the plaintiff's basis for assessing their current value at Thirteen Thousand Nine Hundred Dollars ($13,900.00), rather than that amount determined by the court: Twenty Four Thousand Three Hundred

Seventeen Dollars ($24,317.00). (See T. 18-28; Pl. Exhibits 2 & 4). There is no question that retirement and profit-sharing accounts acquired during the course of the marriage are assets of the marital estate; the difficulty arises in assessing the present value of an asset the parties have no right to make use of until the occurrence of some future event (retirement or termination). Combined with the circumstance here, that the value of said plans flucuated with stock prices and , consequently, with market conditions, any assessment of the value is inherently speculative. Since such plans have some value and since that value should be considered in dividing up the marital estate, the trial court must make that decision based on the best evidence of value available. The least speculative approach is to assume present retirement or termination, and assess the resulting value to the estate; such event, however, would clearly be a taxable event, resulting in a present tax obligation pursuant to current tax provisions. The real value of the plan would be the net value after it is diminished by the tax obligation. It is inconsistent and illogical to assess the current value of such plan without considering the current tax consequences. There is, afterall, nothing so certain as death and taxes.

In reference to whether the trial court should have considered post separation contributions, plaintiff does not take exception to the general rule and the holdings of this Court in Jesperson v. Jesperson, 610 P. 2d 326, at 328 (Utah 1980), and Hamilton v. Hamilton, 562 P. 2d 235 (Utah 1977), but rather submits that that rule

is not inflexible and that the provisions of Section 30-3-5 Utah Code Annotated do not specifically provide that the marital estate be divided per its value at the time the marriage is terminated, only that the determination as to the equitable division be made at that time. The obvious exception to the general rule would arise where there had been a separation of years prior to the actual termination of the marriage, during which one spouse worked and saved diligently while the other did quite the opposite; it would certainly be an abuse of discretion, in that event and absent specific reasons to the contrary, to require the thrifty spouse to assume some of the debts of the other and at the same time divide the value of that spouse's savings. Likewise, where one spouse deserts, abandons the home and family, it would be unjust and an abuse of discretion to award that deserting spouse a portion of subsequently hard-earned contributions even though they are acquired to the actual termination of the marriage.

In this regard, the trial court did in fact determine the value of the liquidated account based on its value in July of 1984 (F. 13); and the trial court abused its discretion in not rendering a ruling on the unliquidated stock plans consistent therewith. The value of the marital estate, set by the trial court at Seventy Three Thousand Six Hundred Twenty Nine Dollars ($73,629.00) (F. 13), should accordingly be reduced as follows:

1. Five Thousand Seven Hundred Ninety Dollars ($5,790.00), representing the best evidence of the tax obligation on the

unliquidated stock plan if it was to be liquidated at present value.

2. Four Thousand Dollars ($4,000.00) as the value of contributions added to that plan after July of 1984. (Pl. Exhibit 2; T. 18-28).

3. Seven Thousand Dollars ($7,000.00) representing that amount of marital debts over and above auto loan and home mortgage obligations. (R 28-32).

The total amount plaintiff is seeking to have deducted from the marital estate, before division, is Sixteen Thousand Seven Hundred Ninety Dollars ($16,790.00), reducing the value of the estate to the sum of Fifty Six Thousand Eight Hundred Thirty-Nine Dollars ($56,839.00). This matter should be remanded to the trial court for such further proceedings as are appropriate in the premises.

CONCLUSION

Plaintiff respectfully seeks an Order Of The Court reversing the trial court's dividing the custody of the children, and particularly seeks the awarding to plaintiff of custody of the youngest child issue of the marriage, Jamie Alexander. Plaintiff further seeks modification of the property division, and particularly that the defendant be awarded one half of a marital estate valued at Fifty-Six Thousand Eight Hundred Thirty-Nine Dollars ($56,839.00) rather than the amount of Seventy-Three Thousand Six Hundred Twenty-Nine Dollars.

Respectfully submitted this 25th day of November, 1985.

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CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and correct copies of the foregoing Brief of Appellant to James B. Hanks, 450 East 1000 North, Suite #311, North Salt Lake, Utah 84054, postage prepaid, on the 25th day of November, 1985.

A D D E N D U M

FINDLNGS OF FACT

AND

CONCLUSIONS OF LAW

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IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

STEPHEN NORRIS ALEXANDER,	*	
Plaintiff,	*	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	*	
DIANE JEAN ALEXANDER,	*	Civil No. 35975
Defendant.	*	

The above entitled matter came on regularly for hearing on the 22nd day of April, 1985, at the hour of 9:00 a.m. before the Honorable Douglas L. Cornaby, Judge presiding, with plaintiff present and represented by his counsel, William H. Lindsley, and defendant appearing in person and represented by her counsel, James Hanks. The court having sworn witnesses, received testimony and evidence relating to the case and after consideration of the same, enters the following:

FINDINGS OF FACT

1. Plaintiff is an actual and bona fide resident of Davis County, State of Utah, and has been so for more than three months immediately prior to the commencement of this action.

2. Plaintiff and defendant are wife and husband, having been married on the 2nd day of May, 1968 in Tucson, Arizona.

3. During the course of the marriage defendant has treated

plaintiff cruelly, and has treated his children cruelly resulting in extreme emotional distress to plaintiff.

4. Plaintiff and defendant have had four children born to them as issue of this marriage, Darl Rene Alexander, born October 5, 1968, Beverly Alexander, born February 20, 1970, Stephen Norris Alexander, Jr. born October 19, 1971 and Jamie Alexander, born November 14, 1980.

5. Plaintiff should be awarded the sole care, custody and control of the parties' three older children, Darl, Beverly and Stephen Norris Jr..

6. Defendant should be awarded the custody of the parties' minor child, Jamie.

7. The Court believes that there is some instability on the part of the defendant.

8. The Court believes that there was an illicit sexual relationship between defendant and James Devorak during the trip in which defendant abandoned the family home and members of the family, except the youngest child and traveled out-of-state to Montana, then South Dakota and finally Missouri with James Devorak.

9. Neither plaintiff nor defendant should be awarded any sum as and for child support.

10. Neither plaintiff nor defendant should be awarded any sum as and for alimony.

11. Plaintiff should be ordered to discharge the debts incurred by the parties during their marriage.

12. Each of the parties should be ordered to discharge the debts they incurred subsequent to the separation on July 18, 1994.

13. That the total assets of the marriage are in the value of

Seventy-Three Thousand Six Hundred Twenty-Eight Dollars ($73,628.00) in value, which should be divided equally. These assets include: Thirteen Thousand Seven Hundred Ninety Dollars ($13,790.00) in savings, value in July, 1984 with deduction for income tax obligation; Twenty Four Thousand Three Hundred Seventeen Dollars ($24,317.00) in retirement profit sharing interests with no deduction for amounts contributed after July, 1984 and no deduction for income tax obligations thereon; Twenty Four Thousand Dollars ($24,000.00) in home equity; and Eleven Thousand Five Hundred Dollars ($11,500.00) in other personal property. No deduction made for outstanding debts of the marriage.

14. The personal property should be divided as follows:

TO PLAINTIFF:

a. the van; and

b. household furnishings and remaining items of personal property left in the family home in Bountiful.

TO DEFENDANT:

a. the two Ford automobiles; and

b. personal property previously removed by defendant from the family home in Bountiful.

15. The remaining assets of the marriage should divided as follows:

a. plaintiff should be awarded the home and real property located at 361 East 300 South, Bountiful, Utah and more particularly described as follows:

> Beginning on the North line of 3rd Street at a point 168.5 feet Esat of the Southwest corner of Lot 1, Block 13, Plat "A", Bountiful Townsite Survey and running thence North $0^{\circ}17'$ East 170.5 feet more or less, to the North line of Lot 1, thence N $89^{\circ}56'$ East 65.62 feet

along the North line of Lot 1; thence South 0°04' West 170.5 feet; thence North 89°56' West 65.62 feet to the point of beginning.

subject to the provisions set forth in paragraph 16, below.

b. Defendant should be awarded the sum of Thirty-Six Thousand Eight Hundred Fourteen Dollars ($36,814.00) as follows: One Thousand Dollars ($1000.00) representing the value of the vehicles; Fifteen Thousand Dollars ($15,000.00) in lump sum cash and balance of Twenty Thousand Eight Hundred Fourteen Dollars ($20,814.00). No deduction made for value of personal property removed from the family residence on the 14th day of March, 1985.

16. Plaintiff should be ordered to pay the balance of Twenty Thousand Eight Hundred Fourteen Dollars ($20,814.00), secured by a lien against the real property more particularly described in paragraph 15a, above, upon the first occurance of any of the following:

a. the youngest child in plaintiff's custody obtains the age of majority;

b. the cohabitation of plaintiff with another female, or remarriage;

c. the sale of the parties' home; or

d. plaintiff ceases to use the parties' home as his principal place of residence.

17. The Court should retain jurisdiction, particularly as regards the Court's concerns regarding child custody.

From the foregoing Findings of Fact the Court now enters its:

CONCLUSIONS OF LAW

Plaintiff should be awarded a Decree of Divorce from defendant to become final upon the date of signing and entry herein. Said Decree shall

include all of the provisions mentioned in the foregoing Findings of Fact.

Therefore let judgment be entered accordingly.

DATED this 17th day of ~~June~~ July, 1985.

BY THE COURT:

/S/
DOUGLAS L. CORDAY
District Judge

APPROVED AS TO FORM:

/S/
JAMES HANKS
Attorney for Defendant

TRANSCRIPT OF

TRIAL COURT'S RULING

(Pages 132-143 of trial transcript)

spent from age 15 until now taking care of the children, that she be awarded a sum of alimony to get her on her feet again. I think it's not fair to--you know--she has devoted her life to those kids, and I know it's--she regrets having to leave also, but she has devoted her life to those kids, and she hasn't pursued a career as Steve has.

Now he's set up. He has a profession. I ask the Court to award a reasonable sum of alimony.

Your Honor, finally, I would just argue one more time that I feel in the best interest of the children, custody should be with their mother, and that's all I have.

THE COURT: Thank you.

In ruling on this matter, the Court will make the following findings and decision:

First, that the plaintiff was an actual and bonafide resident of Davis County at least three months prior to the filing of this action for divorce, having been filed on August 13, 1984;

That plaintiff and defendant are husband and wife, having married on May 2nd, 1968, in Tucson, Arizona.

Four children have been born issue of the marriage, Darla Alexander, born October 5, 1968;

Beverly Alexander, born February 20, 1970; Stephen Alexander Jr., born October 19, 1971; and Jamie Alexander born November 14, 1980.

That the defendant has treated the plaintiff cruelly, causing him to suffer great mental distress by leaving the home of the parties, and doing that and having an affair with another man, and for cruel treatment to the children. For these reasons, the Court will grant a divorce to the plaintiff and against the defendant which may become final on entry.

The plaintiff is awarded the care, custody, and control of the three older children, Darla, Beverly, and Steve; and the defendant is awarded custody of the fourth child, Jamie.

And let me add to this that from the testimony given, neither is a perfect parent, but then none of us are perfect parents. There's no question, that all three of the older children have had some bad experiences that they're claiming from you, Mrs. Alexander. Not discipline, but beatings, and as I award that younger child to you, it's with concern that there may be a repitition of those things.

If it ever becomes a matter, and children need discipline, but they do not need corporal punishment, as it's called, using some force. That's not including

beating. Never does. And yet all three of the older children claim to have experienced that in talking to me privately, and I just make it a point.

I'm aware, too, that I can't ignore the testimony, Mr. Alexander, that try like you would, you may not be maintaining the kind of cleanliness of a home that needs to be for raising the three children you've got. I recognize it's only your wife and her friends that have testified to those things. They say they're of a negative nature.

If they're as bad as they testified to, there would be grounds for not allowing you to have custody of the three older children. But you're the only one that is a practical person to have custody of those three older children, and if the home was as bad as it's been testified to on the day that your wife went in on March 1985, then I'm assuming that was not a normal condition.

And I say that for the same token, because if minimum standards of house care are not maintained, then these matters have to be brought back before the Court with an idea about doing something about custody, you see.

I ought to say this: The Court believes, Mrs. Alexander, that there's been a great deal of

instability. The Court does not believe in these long relationships that you've talked about on a platonic basis where you just associate. I do not believe week after week people sleep together in the same bed without a sexual relationship. I'm not that naive.

I believe, just as it's been--the implications given to the Court, that it occurred. And if those kinds of things take place in the presence of a child, they're grounds also for having a child taken away from a person.

I tell you these things because I've awarded children both ways in this case, and if the matter needs to be, the Court always retains jurisdiction to bring the matters back in to be heard even if you're not living here and he's living in Davis County.

Now, property--let me say about support of the children. I think that the plaintiff had not ought to be required to pay any support for the children that you have with you. I don't think you ought to be required to pay support to him because of the three children he has, taking into account, both of you have relative earning power. Not much has been said. Not much has been said with regard to alimony or your income. I gather you have about $200 a month income, maybe more. Nobody's said anything about it.

The Court does look at the trip, that you left as basically abandoning the family, not just a marital problem. When people have a marital problem, they consult a lawyer or consult their church counselor or get a psychologist or somebody to get counseling from. And then when they can't live together any more, they file for divorce and begin to work the hinges out.

And when they're all through with it, if they're going back to live with the mother in Missouri, I don't object to that because that frequently happens. People go back to their own family to live with because that's the only way they can make it. That's not the kind of situation the Court views it as when you left. It was a matter of going to apparently Montana for some short period of time, a few weeks or whatever, and then over to South Dakato, and then on to Missouri.

So it wasn't just a matter of going back there. And it wasn't just a matter of having to get out of the home, because you left with another man. And those are certainly considerations in the things the Court's doing in this case, and I go through these things because they're reasons for the Court not awarding any alimony in this case, and I'm not going to award any.

Each party is going to pay their own attorney fee.

There's been a number of debts that were listed in the financial statement of plaintiff, and I'm going to require him to pay those debts. I'm going to require each of you to pay the debts you might have incurred since the time of separation. In other words, if you incurred any debts from the time you left back in July, you'll have to pay those debts.

For valuation purposes property wise, that's been a major problem with the parties and the Court valuing the property in this manner. Retirement, and I'm talking now about those listed as one and two in Plaintiff's Exhibit 2. I'm valuing those at $24,317, and do not believe there should be any amount taken off for future taxation.

Value of the house at $24,000, as stipulated by the parties. The Court's valuing the $21,000 that was drawn from savings at $13,790 which in affect is allowing the plaintiff credit for the taxes that he's going to incur immediately because of--recognize that amount was an estimate--but nevertheless, the Court's accepting it as the only evidence it has before it as a reasonable basis on which to make this $13,790 valuation.

The value of the furniture at $7,500; the Dodge Van at $1,500, which is the amount listed as what

was still owing on it.

Each of the Fords--'73 Fords valued at $500; Travel Trailer at $1,000; the VW buggy at $500.

While I've sat here, I've added it, and if I added it correctly, and I don't claim that it's correct, but it totals $73,629. And in fairness in this case, these parties for 17 years have been together and each ought to have one half of that value. One half value, that would be $36,814.

The two Ford cars are awarded to the plaintiff, and counsel for the plaintiff has indicated there's about $15,000 available in that savings account to be paid if the Court--depending on how I made this division. I'm going to order that $15,000 to be paid to the defendant as a partial part of her share, and that would total $16,000.

All the other property being awarded to the plaintiff. Then if I subtract that from the $16,814 for her half, it leaves $20,814 in what ought to be paid to her, and I'm going to direct that she--the house is awarded to the plaintiff, but that she's going to maintain a lien on that house in the amount--that amount, $20,814.

It will be payable on the normal four circumstances that it's normally paid, that's if the plaintiff cohabits with somebody not his wife, or if he

remarries, or if he moves from the home, or it ceases to be the primary living place of the parties, or when the youngest child reaches 18.

Now, I think I've gone through everything. Any questions, Counsel?

MR. HANKS: Now, you awarded $15,000 to Diane and also the car, or what made it $16,000?

THE COURT: Two cars.

MR. HANKS: The two Fords?

THE COURT: Yes.

MR. LINDSLEY: Did your Honor take into account the debts and subtracting them from the total value of the marriage?

THE COURT: No, I didn't. I took that into account in deciding whether or not he ought to pay alimony. Normally with a 17-year marriage, in a situation like this, you'd probably expect the plaintiff to pay three or four or five hundred dollars a month alimony for a period of two or three years to help the other party get on some kind of equivalent buying power, and I haven't done that partially balancing out these equities between the parties, and partially because she chose to walk away from the marriage in the way she did.

Any other questions?

MR. LINDSLEY: Yes. One other question,

your Honor. I'd like to know the particular finding that the Court finds in arriving at the decision that Jamie Alexander should be awarded to Mrs. Alexander.

THE COURT: You mean besides what I've already said?

MR. LINDSLEY: Well, your Honor, you've indicated that you believe there's instability and you believe she abandoned the marriage. You believe--.

THE COURT: She didn't abandon the children. She took that child with her. She didn't abandon that child.

There's been nothing before the Court to show there's any lack of care for that child. There's been nothing to show she has not properly cared for that child during the period of time of approximately, not quite, near nine months, whatever it's been since she left with that child.

There's some instability, and for that puspose, she's, you know, she's lost the custody of three children.

And by the way, you recognize there's reasonable visitation privileges with each of the parents and their minor children, and anybody that exercises that visitation privilege is going to have to pay for the transportation cost of those visiting. And normally

visitation, of course, since you're in different states, normally we would put them at about half-of-a-summer period.

But it would--what it means is that if the defendant had visitation with the children, they were going back to Missouri, she would have to pay the transportation cost back there. If the plaintiff has visitation privileges with Jamie for that period of time, he has to pay the transportation cost back here, both directions, I'm saying.

Also, it's not unreasonable, of course, when you have these, if the parties want to, they can also have Christmas visitation, which, because of schooling, normally we would say from December 26th through January 1st.

And so this can be part of the order, but again, the parties exercising it has to pay those transportation costs.

Now, I haven't found the defendant to be an unfit mother. I didn't say she was an unfit mother any more than I said the plaintiff was an unfit father, but I think that as between the two, I think you both have some problems in raising kids. Part of the plaintiff's problem is because he's spent most of his married life earning a living, not raising children. And though I find--

I'm saying there's some instability. I recognize that instability in the defendant's life. I'm not saying that it's such an instability that it creates her from being a fit parent to care for that one child, and of all the children to award to her, that's obviously to the Court the best division the Court can make.

Those three older children do not want to live with the defendant, even though all three of them expressed love for her. Apparently they don't get along with her. There's some factors in there, but is that enough or do you want some more?

MR. LINDSLEY: Well, I take acception to it.

THE COURT: Sure, you do. That's what lawyers are for.

Anything else, though?

MR. HANKS: One other thing. Regarding the furniture, your Honor, did you award--.

THE COURT: I awarded it all to the plaintiff. That's why I went through this before I finished because I wanted to know, and they said, no, the plaintiff is taking all the furniture. And the only thing she's taking is a few little personal items that she wants.

So that's the way the division is. If

you two want to divide that $7,500 further between you, that's perfectly all right with me, and you put a dollar value between the $7,500 value between the two of you. If you want to stay and do it, you can do it. Let me know what you agree on.

Any questions? That's all. The court will be adjourned.

MR. LINDSLEY: Should I draw the order, your Honor?

THE COURT: Yes.

(Whereupon, at the hour of 12:30 p.m., the proceedings came to a close.)